

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Sandwich Isles Communications, Inc.)	
)	
Petition for Waiver of the Definition of “Study)	CC Docket No. 96-45
Area” Contained in Part 36, Appendix-Glossary)	
and Sections 36.611, and 69.2(hh) of the)	
Commission’s Rules)	

**REPLY TO OPPOSITIONS TO
HAWAIIAN TELCOM’S APPLICATION FOR REVIEW**

Hawaiian Telcom Communications, Inc., on behalf of its incumbent local exchange carrier (“ILEC”) subsidiary, Hawaiian Telcom, Inc. (together, “Hawaiian Telcom”), hereby submits this Reply to oppositions to Hawaiian Telcom’s Application for Review of the Order issued by the Wireline Competition Bureau (the “Bureau”).¹ The Application for Review should be granted. Hawaiian Telcom demonstrated that it has standing under the FCC’s rules. The Bureau’s Order aggrieved Hawaiian Telcom and could impact its customers. The Order exceeded the Bureau’s delegated authority. FCC precedent does not support the grant of a study area waiver to Sandwich Isles Communications, Inc. (“SIC”). At the very least, the Commission should delineate the boundary of SIC’s new study area and SIC’s obligations under federal law.

I. HAWAIIAN TELCOM HAS STANDING TO SEEK REVIEW OF THE ORDER

The FCC’s rules grant standing to submit an application for review to “[a]ny person aggrieved by any action taken pursuant to delegated authority.”² Because the Order carved out approximately 203,500 acres from Hawaiian Telcom’s study area and placed Hawaiian Telcom at a competitive disadvantage, Hawaiian Telcom is aggrieved and has standing

¹ *In the Matter of Sandwich Isles Communications, Inc.*, CC Docket No. 96-45, DA 05-1355 (Wireline Comp. Bur. rel. May 16, 2005) (“Order”).

² 47 C.F.R. § 1.115(a).

to file its Application for Review.³ While Hawaiian Telcom did not formally oppose SIC's original petition, it raised numerous issues that ought to have been resolved.⁴

Moreover, Hawaiian Telcom has become more familiar with pertinent facts since the acquisition of Verizon Hawaii. For example, SIC has asserted its exclusive right to serve HHL customers even though the customers requested service from Verizon, and Verizon had facilities capable of providing service.⁵ Similarly, the DHHL and SIC have asserted SIC's exclusive right to serve HHL customers in order to force Verizon and now Hawaiian Telcom to remove and/or relocate facilities that it would have the right to maintain even if the Order is upheld.⁶ In addition, SIC continues to articulate its intent to serve urban areas outside the HHL through affiliates.⁷

This case is unique. Both the incumbent and new entrant were willing to provide service in the HHL for compensation, only the new entrant decided to seek a study area boundary change for the sole purpose of maximizing high-cost support.⁸ The Bureau's Order departed from FCC precedent and exceeded delegated authority in granting the requested waiver solely to maximize high-cost support to an area that was not unserved under the Commission's own definition.⁹

³ Hawaiian Telcom is not seeking compensation for removal of much of the HHL from its study area. SIC Opposition, CC Docket 96-45, at 4 (filed June 30, 2005). Hawaiian Telcom referenced the lack of compensation to distinguish this case from Commission precedent where the transferring carrier typically *sold* the exchanges.

⁴ Application for Review at 12-16. *Sprint v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) is inapplicable as it is a case where Sprint alleged that it would have prepared different comments had the Commission characterized the scope of the subject proceeding differently. SIC clearly knew the stakes in this proceeding, and knew that neither Verizon nor Hawaiian Telcom supported its petition.

⁵ See Affidavit of Daniel Masutomi at ¶¶ 8-9 attached hereto ("Masutomi Affidavit").

⁶ *Id.* at ¶¶ 3-4.

⁷ Application for Review at 12-14 (quoting Al Hee and Gil Tam). SIC Opposition at 13, n. 31.

⁸ *In the Matter of GTE Hawaiian Telephone Company, Inc.*, Memorandum Opinion and Order, AAD 97-82, 19 FCC Rcd 22268, ¶ 8 (2004) ("2004 Order").

⁹ 47 C.F.R. §§ 0.291(a)(2) and 1.115(b)(ii); 2004 Order at ¶¶ 7,8.

II. FCC PRECEDENT DOES NOT JUSTIFY THE WAIVER

SIC is mistaken about the application of FCC precedent to these facts. First, the *PTI/Eagle Order* did not address whether to include in an adverse impact analysis support payments to CETCs directly resulting from a waiver grant, nor did *PTI/Eagle* involve a history of rapidly increasing support.¹⁰ Here, the Commission has historical data showing growing high-cost support to SIC as well as to a CETC receiving support based on the amount SIC's receives. Typically, a transferee of exchanges receives the same universal service support as the transferor received.¹¹ That is not the case here – SIC's support has grown from over \$5,800 per-line in 2002, or 0.16% of the fund, to a whopping \$14,000 per-line in 2005, or 0.42% of the fund – a relative growth in support of over 250% in three years.¹² SIC's claims that future support will decrease are unsupported.¹³

Second, the Bureau's Order ignores that the areas in question were not "unserved" within the Commission's meaning of that term.¹⁴ While Hawaiian Telcom agrees that HHL residents benefit from over \$14,000 per-line per year in universal service support, it is obvious that any community would benefit from such largesse. It is not clear why SIC should be granted a waiver, the sole purpose of which is to increase support, on the basis that the area to be supported was "unserved," when the facts and FCC precedent indicated otherwise.

Third, SIC has stated that it plans to use support in part for purposes for which it is not intended, serving areas outside its rural study area, in contravention of Section 254(e) of the Act.¹⁵ SIC's oblique reference to the audit process, without any explanation of what

¹⁰ *US West Communications, Inc. and Eagle Telecommunications, Inc.*, Order, 10 FCC Rcd 1771 at ¶¶ 10-17 (1995) ("*PTI/Eagle Order*").

¹¹ 47 C.F.R. § 54.305(a).

¹² USAC Quarterly Administrative Filing 2002, Third Quarter, Appendix HC01 at www.universalservice.org/overview/filings; Order at n. 53.

¹³ SIC Opposition at iv.

¹⁴ 2004 Order at ¶¶ 8-9.

¹⁵ Application for Review at 12-14.

accounting rules would apply to it as a CLEC, is unconvincing.¹⁶

III. THE COMMISSION SHOULD RESOLVE KEY UNDECIDED ISSUES

The Application for Review enumerated several unresolved issues that the Commission must address. For example, the Bureau refused to decide whether the DHHL issued to SIC an impermissible exclusive license to serve the HHL or left Hawaiian Telcom's statewide study area undisturbed.¹⁷ The Bureau conceded that granting SIC a study area that encompasses the ILEC's territory requires the Commission to decide whether SIC should be classified as an ILEC, yet the Bureau failed to rule on this issue, citing a pending Commission rulemaking.¹⁸ In addition, whether Hawaiian Telcom is eligible to serve parts of the HHL, and on what basis, is of paramount importance to Hawaiian Telcom and its customers. Many federal obligations apply only to ILECs.¹⁹ A study area is not merely "an accounting concept" overlaying an assumption of the ability to serve.²⁰ The FCC froze study area boundaries precisely because of their importance for high-cost support eligibility.

To say that SIC's "study area...[is] limited to only those areas where there were no facilities or service on the Hawaiian home lands in 1997" is not, as SIC asserts, a precise boundary definition.²¹ Hawaiian Telcom disagrees with SIC that "those areas" means "existing customers."²² Hawaiian Telcom's study area must include all geographic areas of the HHL that

¹⁶ SIC Opposition at 13-14.

¹⁷ Order at ¶ 23. The Commission previously ruled that SIC's proposed service area was not "unserved" but was part of the GTE/Verizon study area. 2004 Order at ¶ 9.

¹⁸ See Order at ¶ 15. SIC concedes that Hawaiian Telcom is "free" to institute both Section 251(h)(2) and Section 253 proceedings regardless of the outcome of this proceeding. SIC Opposition at 16-17. Also, SIC concedes that "[a]ll of the GTE/Verizon facilities and customers on the HHL are left in HTC's study area and are not affected by the Bureau Order." SIC Opposition at 4-5.

¹⁹ See, e.g., 47 U.S.C. § 251(c). SIC and DHHL are clearly willing to invoke obligations based on Hawaiian Telcom's ILEC status in the HHL when it is to their advantage. See Masutomi Affidavit at ¶ 6.

²⁰ SIC Opposition at 15-16.

²¹ Order at ¶ 15. SIC Opposition at 15.

²² See *infra* notes 6, 17; SIC Opposition at 16.

its predecessors were capable of serving in 1997 or areas on or adjacent to which it had facilities at that time – whether or not there are new, continuing or former customers in those areas.²³ The boundary issue also is unresolved because the DHHL has added new territory to the HHL since 1997.²⁴ Moreover, to say that there is no “real dispute” and that the parties can “cooperate...to develop maps delineating their respective study areas,”²⁵ ignores the fact that only the FCC can alter study area boundaries.²⁶ Opponents err in stating that no issues need to be resolved.²⁷

For the foregoing reasons, the Commission should grant Hawaiian Telcom’s Application for Review and reverse the Bureau’s Order. Alternatively, the Commission should determine SIC’s study area boundaries and the parties’ rights and obligations in the HHL.

Respectfully submitted,

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/s/

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Dated: July 13, 2005

²³ SIC’s claim that GTE and Verizon have made no facilities investments in the HHL is incorrect. SIC Opposition at 4-5. See Masutomi Affidavit at ¶ 5-7.

²⁴ See *More land for Hawaiians: DHHL gets 1,800 acres*, PACIFIC BUSINESS NEWS, (available at <http://www.bizjournals.com/pacific/stories/2004/09/13/daily40.html>).

²⁵ SIC Opposition at 15.

²⁶ Appendix-Glossary to Part 36 (freezing the study area boundaries). This is an important premise underlying the Commission’s October 2004 order. 2004 Order at ¶ 8.

²⁷ Opposition of Robert N. Herkes, State Representative, 5th District, CC Docket 96-45, at 1-2 (dated June 29, 2005).

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Affidavit of Daniel Masutomi

I, Daniel Masutomi, first being duly sworn, do hereby state as follows:

1. My name is Daniel Masutomi and I am employed by Hawaiian Telcom Communications, Inc. ("Hawaiian Telcom") as the Director – Network Engineering & Planning. I have held this position since June 1, 2005 and I previously held the Manager – Network Engineering & Planning position for Verizon between October 2000 and May 2005. I also held various positions in the engineering and planning organization for GTE Hawaiian Tel between 1987 and 2000. My job responsibilities cover all aspects of the Outside Plant and Inside Plant Network Engineering & Planning functions and include overseeing the Capital-build program. I supervise three major groups in the Network Engineering & Planning department consisting of Outside Plant Engineering, Network Design & Engineering, and an Engineering Support Group.
2. I am familiar with the installation, operation and maintenance of Verizon's (formerly GTE's, and now Hawaiian Telcom's) network infrastructure, the provision of services by Verizon (now Hawaiian Telcom) on the Hawaiian Home Lands ("HHL"), and Verizon's and Hawaiian Telcom's dealings with Sandwich Isles Communications, Inc. ("SIC") and the

Department of Hawaiian Homelands ("DHHL") with respect to the provision of telecommunications services on the HHL.

3. In the Lei Alii area (Lahaina, Maui), Verizon acquired a right-of-entry in 1993 from the State's Housing and Community Development Corporation of Hawaii ("HCDCH") and placed a Digital Loop Carrier ("DLC") to provide service to 104 residential lots. In March 2005, Verizon was notified that these lands were turned over to DHHL and Hawaiian Telcom is now in the process of negotiating an exit plan with the DHHL, SIC, and the HCDCH to remove and/or relocate Hawaiian Telcom facilities located on the property.

4. In 1996, GTE/Verizon installed cable facilities to serve the Waimanalo Residence Lots subdivision, but the DHHL sent a letter in May 1998 to Verizon stating that SIC had exclusive rights to the property and the DHHL forced Hawaiian Telcom to remove its facilities.

5. New service requirements arise frequently in the areas of the HHL served by Verizon since 1997, especially for commercial customers. For example, Hawaiian Telcom was asked this year to provide service to Verizon Wireless and AT&T wireless cell sites in the Hilo Houselots area. Also, shopping complexes such as the Prince Kuhio Plaza and the Walmart shopping center in the Hilo Houselots area occasionally experience tenant turnover. Verizon has provided service to existing and new tenants in these shopping plazas since 1997, and when new tenants occupy those facilities, Hawaiian Telcom expects to be asked to provide service there as well.

6. Between 1997 and 2005, SIC and the DHHL requested that GTE/Verizon install facilities and provide service to new HHL developments pursuant to Verizon's carrier-of-last-resort obligations. For instance, GTE installed facilities to serve the Makuu Farm Lots

subdivision in Keaau established in 1997, the Kawaihae Residential Lot subdivision in Kawaihae established in 1998, and the Hanapepe Heights subdivision established in 1998.

7. Between 1997 and 2005, GTE/Verizon actively upgraded and reinforced its facilities on the HHL. For instance, the company installed a new fiber-fed DLC to the Hilo Houselots area in 1997 and they expanded this DLC again in 1998. Verizon also installed fiber facilities to the Hilo Airport area in 2001, and extended copper facilities to the Molokai Airport area in 2004.

8. In 1999, certain Verizon employees and HHL residents requested service from Verizon pursuant to an employee discount program. SIC interceded and claimed an exclusive right to provide service even though Verizon had existing, directly adjacent facilities capable of providing service.

9. In 2004, a Home Depot opened directly adjacent to existing Verizon customers in Hilo, Hawaii, on the HHL. Despite Verizon's ability to serve Home Depot via existing aerial facilities that passed directly in front of this parcel, SIC interceded and claimed an exclusive right to provide service.

The foregoing is true and complete to the best of my information, knowledge and belief.

Further Affiant Sayeth Not.

Daniel Masutomi
Daniel Masutomi

Subscribed and Sworn to before me this 13 day of July, 2005.



Gwendolyn A. Massiah
Notary Public for the State of Hawaii GWENDOLYN A. MASSIAH
My Commission Expires: FEB. 22, 2008

CERTIFICATE OF SERVICE

I, Thomas A. Allen, hereby certify that on this 13th day of July, 2005, the foregoing "Reply" was served via first class mail, postage pre-paid, upon the following:

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